IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. .....

SOCIETA ANONIMA COOPERATIVA DI NAVIGAZIONE GARIBALDI, as bailee of the ITALIAN VESSEL BRENNERO, her engines, boilers and machinery, tackle, apparel, furniture and equipment,

Petitioner,

against

UNITED STATES OF AMERICA

and

JAMES E. MARKHAM, Alien Property Custodian of the United States,

Respondents.

No. .....

"ITALIA"—SOCIETA ANONIMA DI NAVIGAZIONE, as owner of the ITALIAN VESSEL ALBERTA, her engines, boilers and machinery, tackle, apparel, furniture and equipment,

Petitioner,

against

UNITED STATES OF AMERICA

and

JAMES E. MARKHAM, Alien Property Custodian of the United States,

Respondents.

No. .....

"ITALIA"—SOCIETA ANONIMA DI NAVIGAZIONE, as owner of the ITALIAN VESSEL AUSSA, her engines, boilers and machinery, tackle, apparel, furniture and equipment,

Petitioner,

against

UNITED STATES OF AMERICA

and

JAMES E. MARKHAM, Alien Property Custodian of the United States,

Respondents.

No. .....

"ITALIA"—SOCIETA ANONIMA DI NAVIGAZIONE, as owner of the ITALIAN VESSEL ARSA, her engines, boilers, and machinery, tackle, apparel, furniture and equipment,

Petitioner,

against

UNITED STATES OF AMERICA

and

JAMES E. MARKHAM, Alien Property Custodian of the United States,

Respondents.

BRIEF IN SUPPORT OF PETITION

A

Introductory Statements

1

Report of Opinions Below

The opinion of the Court of Appeals, announcing its decision of affirmance, is reported in 153 F. 2d 138. No opinion was delivered by it on its denial of the petition for a rehearing.

The opinion of the District Court is reported in 52 F. Supp. 927.

2

Basis of Jurisdiction

The basis of this Court's jurisdiction is set forth in the Petition (*supra*, 17).

3

Specifications of Error

Petitioner's * specifications of error are set out in the Petition (*supra*, 20-39).

B

Summary of Argument †

Petitioner was entitled under the guaranties of due process to defend its property when assailed, as it here was, in court (Const., 5th Am'd't.; *McVeigh* v. *United*

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* The term "petitioner" as used herein, refers to the petitioner "Italia"—Societa Anonima di Navigazione not only for itself, but as typical and representative of all the petitioners respectively in the other above-entitled causes, on behalf of all of whom this brief is submitted.

† For the fully developed argument the Court is respectfully referred to the First to Fifth Points inclusive in Petitioners' Brief filed herewith in *The Antoinetta, No.* here.

States, 11 Wall. 259; *Windsor* v. *McVeigh,* 93 U. S. 274, 278; *Watts, Watts & Co.* v. *Unione Austriaca, etc.,* 248 U. S. 9, 22; Petitioner's Brief filed herewith in *The Antoinetta,* No. , pp. 55-66). This right it was denied, though it had been cited to appear and defend, its appearance and proffered defense were rejected and itself driven from court and adjudged and decreed to be without any property right in the *res* it had sought to defend as its own.

The theory upon which the lower courts proceeded was (1) that a claimant's right to a trial of its defense of title to a *res* against the Federal Government's asserted forfeiture title does not survive a valid determination by the court adverse to its title; (2) that here the court had made a determination adverse to its title by finding that the same either had been forfeited for crime on March 28, 1941, or had been captured for enemy ownership on July 22, 1942; (3) that, therefore, petitioner here had no right to a trial of its defense of title.

The prime trouble with that reasoning is that, in making the determination referred to in the second premise, the court assumed that it *could validly* make, and *had validly* made, such determination *without a trial.* The court thus begged the whole question, by assuming the very thing to be proved. Its reasoning amounted to no more than this: Petitioner was entitled to no trial of its defense of title, because *without a trial* the court had found it had no title to defend.

Petitioner was entitled to a trial of its defense of title to the *res* against both adverse claims asserted in court, that of forfeiture for crime and that of capture for enemy ownership, (cases cited, *supra,* 50-51). But neither claim could be tried save at the appropriate time (*U. S.* v. *Hamb.-Am. Co.,* 239 U. S. 466, 475). If the court had jurisdiction,

the time was appropriate for the trial of the asserted forfeiture title. But there could be no appropriate time for trial of the claim of title by capture until, in any event, the claim of title by forfeiture was out of the way (*The Sally,* 8 Cranch. 382, 384; *The Hampton,* 5 Wall. 372, 376; *The Gray Jacket,* 5 Wall. 370, 371). For the two claims were utterly inconsistent and could not be asserted at one and the same time: One and the same party could not at once occupy the two irreconcilable positions (*Flanigan* v. *Turner,* 66 U. S. 491; *Scholey* v. *Rew,* 23 Wall. 331, 351; *Railway Co.* v. *McCarthy,* 96 U. S. 258, 267-268; *Hopkins* v. *Grimshaw,* 165 U. S. 342, 357; *Pease* v. *Rathbun-Jones Eng. Co.,* 243 U. S. 273, 277; *Norfolk Southern R. R. Co.* v. *Chatman,* 244 U. S. 276, 281-282); nor pursue the two irreconcilable remedies (*Van Winkle* v. *Crowell,* 146 U. S. 42, 50-51; *Robb* v. *Vos,* 155 U. S. 13, 41-43; *Stuart* v. *Hayden,* 169 U. S. 1, 15; and *United States* v. *Oregon Lumber Co.,* 260 U. S. 290, 294-295). Here, the only event in which the claim of title by forfeiture could be out of the way prior to its trial, was the District Court's want of jurisdiction over that claim. The District Court *was* without jurisdiction over that claim (*Antoinetta* Brief *supra,* pp. 111-126). The court was, therefore, at once in a position to pass upon the claim of title by capture.

That claim of title by capture was bad on the face of the record for several reasons, viz.: (1) It was bad on the face of the record because that showed that petitioner's property in the "Aussa" had from and after a time anterior to the outbreak of war been engaged, and at the time of the alleged capture was still engaged in lawful trade not with private American citizens under the revocable permission of a license, but, instead, with the United States Government under the irrevocable permis-

sion of a vested contract right authorized by Congress and concluded with the sovereign United States itself, whereunder as to that property the war was suspended, that property was non-enemy property and petitioner *quoad hoc* an alien friend (*Antoinetta* Brief *supra,* pp. 66-70),—and whereunder the petitioner's property was to be respected and restored, either in kind or in value, at the conclusion of the contract service, together with hire for its use in the meantime (Idle Foreign Vessels Act, *supra,* 6 n.); that the Trading with the Enemy Act (*supra,* 10 n.) was in no event applicable, since that Act was designed to cover property engaged or held in *private* trade by *private citizens,* not that engaged or held under public contractual relations between the American sovereign and its enemy owner (S. Repts. Nos. 111, 113, pp. 1, 10-11, 15, 16, 18, 19, 65th Cong., 1st Sess.; *Antoinetta* Brief *supra,* pp. 66-70); and that, if applicable, that Act by necessary implication granted immunity to enemy property engaged in such public intercourse and under such a sovereign contract (*Antoinetta* Brief *supra,* pp. 71-83). (2) It was bad on the face of the record because that showed that the only property petitioner possessed in the *res* at the time of the alleged capture consisted in and of the sovereign contractual obligation or debt of the United States to restore the vessel, in kind or value, to petitioner at the close of the requisition service with just charter hire for its use in the meantime (R. 23a; Const., 5th Am'd't.; Act of June 6, 1941, *supra,* 6 n.): And it was not in the statutory or constitutional power of the Federal Government to capture the sovereign's own contractual obligation or debt, for to attempt such a thing was nothing more nor less than to attempt its repudiation; which was forbidden, not only because Congress *could not* authorize it (Const., 14th Am'd't., sec. 4; *Perry* v. *United*

States, 294 U. S. 330, 352, 353, 379-380; *Antoinetta* Brief *supra,* pp. 84-90), but also because Congress *had not* authorized it even in the Act relied on by the would-be captor (Trading with the Enemy Act, *supra,* 10 n.; *Antoinetta* Brief *supra,* pp. 66-99). (3) It was bad on the face of the record because that showed the vessel *res* to be a deposit which was accepted on the public faith by the Federal Government from petitioner in peace-time and to the return of which, in kind or value, with hire for its use in the meantime, the public faith was plighted; and that, therefore, despite the ensuing war, it was immune to capture, as was that public faith to repudiation (Const., 14th Am'd't, sec. 4; *Perry* v. *United States, supra; Antoinetta* Brief *supra,* pp. 66-99). (4) It was bad on the face of the record because that showed that the alleged captor had found no property in the *res* that was subject to capture and, instead, left to the court the determination whether there was any such (R. 28a, 30a; *Stoehr* v. *Wallace,* 255 U. S. 239, 244-245; *Hunter* v. *Central Union Trust Co.,* [D. C., S. D. N. Y.], 17 F. 2d 174, 175, 178; *Antoinetta* Brief *supra,* pp. 100-102).

The reasoning of the court, as expounded *supra* (51), also was fallacious in that its first premise,—that is, that petitioner's right to a trial of its defense of title did not survive a determination by the court adverse to its title,—was insupportable unless limited in its terms to the case of a determination by the court (1) that petitioner's title had been lost prior to seizure of the *res* for forfeiture; and (2) that, when so lost, it had carried with it every legally valuable benefit petitioner might thereafter otherwise reap from an adjudication that such seizure was tortious, or at least unsustainable. For, (a), so long as petitioner held title at the time of that seizure,

it was petitioner who was thereby damaged and possessed the right to sue the seizor for damages if such seizure was tortious and, therefore, possessed the right to prove such seizure tortious; which could be proved nowhere else than in the trial of the claim of title by forfeiture and not otherwise than by the defeat of that claim (*Gelston* v. *Hoyt*, 3 Wheat. 246, 314; *The Apollon*, 9 Wheat. 362, 367; *United States* v. *422 Casks of Wine*, 1 Pet. 547, 549-550; *Antoinetta* Brief *supra*, pp. 103-106). And, (b), so long as petitioner, despite such loss of title, would, from a defeat of the asserted forfeiture title, reap, by reason of the very fact of its quondam title, a legally valuable benefit, it was its right to seek that defeat and save that benefit (*The Beaconsfield*, 158 U. S. 303, 307; *Pendleton* v. *Benner Line*, 246 U. S. 353, 356; *The Kaiser Wilhelm II* [C. C. A., 3rd Cir.], 247 Fed. 786, 789; *Queenan* v. *Mays* [C. C. A., 10th Cir.], 90 F. 2d 525, 534-535; *The Regina del Mare*, Br. & L. 315, 316; *Chipman* v. *City of Hartford*, 21 Conn. 488, 498; *Antoinetta* Brief *supra*, pp. 106-108). And such a benefit petitioner, if it succeeded in defeating the asserted forfeiture title, was in a position here to preserve, viz., the continued trusteeship of the alleged captor of the *res* for the benefit of petitioner's American creditors and, to the extent their claims were so satisfied, its own freedom from any and all further personal liability therefor (Trading with the Enemy Act, sec. 9(a), *supra*, 11; *White* v. *Mechanics Securities Corp.*, 269 U. S. 283, 301; *Markham* v. *Cabell* (U. S. Sup. Ct.), Adv. Op. No. 76, Dec. 14, 1945).

The Alien Property Custodian in no event had any right to succeed to the defense of petitioner's claim of title because the former was but an agent of the libellant, and to permit him to defend was but to permit the libel-

lant to defend against libellant's own suit (*Banco Mexicano* v. *Deutsche Bank,* 263 U. S. 591, 603; *Becker Co.* v. *Cummings,* 296 U. S. 74, 78; *Cummings* v. *Deutsche Bank,* 300 U. S. 115, 118). Such identity of interest must at once destroy the court's jurisdiction to try the cause, at least as against petitioner's property therein (*Lord* v. *Veazie,* 8 How. 251; *Cleveland* v. *Chamberlain,* 66 U. S. 419; *Wood-Paper Co.* v. *Heft,* 8 Wall. 333; *Globe & Rutgers Fire Ins. Co.* v. *Hines* [C. C. A., 2d Cir.], 273 Fed. 774, 777, 778).

The Circuit Court, apparently conceding as much, nevertheless held that such loss of jurisdiction to try libellant's asserted forfeiture title to petitioner's property in the *res,* would still leave at least *some* controversy within the court's jurisdiction, viz., such controversy as *might* develop between third-person mortgage, maritime, attachment and stipulation lien-holders, *if any,* on the one hand, and libellant on the other. But herein the court erred: For (1) the statute (Act of June 15, 1917, Title II, sec. 3, *supra,* 4 n.), relied on as authorizing the forfeiture, authorized only the forfeiture of the *res,* not of specific interests therein; (2) it did not authorize the forfeiture of the liens of presumably innocent third persons and the remission of the penalty to the only interest charged with its violation, to-wit, the owning interest; and (3) so to enforce it against the former and withhold its enforcement against the latter, would violate the law giving power of remission to the Secretary of the Treasury alone, and that, too, only on his first finding the absence of the very criminality charged in the libel (Act of June 17, 1930, c. 497, Title IV, secs. 616-618, *supra,* 33 n.). The substitution of libellant in petitioner's role of claimant would defeat the court's jurisdiction, not merely over a

part, but over the whole, of the forfeiture cause (*Antoinetta* Brief *supra*, pp. 109-110).

The court's want of jurisdiction to try the Federal Government's asserted forfeiture title, which alone, as pointed out *supra* (51-52), could confer upon it a present jurisdiction to try the Government's asserted captor's title, was due (1) to the libel's alleging, as the statute authorizing forfeiture, one without force or effect at the time of the offense charged in the libel; (2) to the libel's alleging, as the offense giving rise to the alleged forfeiture title, one not made by that statute a ground of forfeiture; (3) to the Government's requisitioning the *res* as petitioner's property, and not its own,—after it had filed its libel on the contrary theory,—and in connection with said requisition, availed itself of a statute designed to destroy the court's jurisdiction and thereby subscribed to terms and conditions inconsistent with the further exercise thereof, from the effect and prejudice of which terms and conditions the District Court was powerless to relieve it; and (4) to libellant's depriving the court of custody of the *res* so requisitioned and thereby destroying the only basis of jurisdiction upon which the court was authorized to proceed with the *in rem* cause (*Antoinetta* Brief *supra*, pp. 111-126).

CONCLUSION

The petition for writs of certiorari should be granted to the end that the proceedings had below may here be reviewed and the decrees there entered reversed.

Respectfully submitted,

HOMER L. LOOMIS,
Counsel for Petitioners.

No. 1176-1179

In the Supreme Court of the United States

OCTOBER TERM, 1945

SOCIETA ANONIMA COOPERATIVA DI NAVIGAZIONE GARIBALDI, AS BAILEE OF THE ITALIAN VESSEL "BRENNERO," HER ENGINES, BOILERS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

AND

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN

"ITALIA"-SOCIETA ANONIMA DI NAVIGAZIONE, AS OWNER OF THE ITALIAN VESSEL "ALBERTA," HER ENGINES, BOILERS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

AND

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN

"ITALIA"-SOCIETA ANONIMA DI NAVIGAZIONE, AS OWNER OF THE ITALIAN VESSEL "AUSSA," HER ENGINES, BOILERS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

AND

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN

"ITALIA"-SOCIETA ANONIMA DI NAVIGAZIONE, AS OWNER OF THE ITALIAN VESSEL "ARSA," HER ENGINES, BOILERS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

AND

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE ALIEN PROPERTY CUSTODIAN IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 1176

SOCIETA ANONIMA COOPERATIVA DI NAVIGAZIONE GARIBALDI, AS BAILEE OF THE ITALIAN VESSEL "BRENNERO," HER ENGINES, BOILERS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

AND

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN

No. 1177

"ITALIA"-SOCIETA ANONIMA DI NAVIGAZIONE, AS OWNER OF THE ITALIAN VESSEL "ALBERTA," HER ENGINES, BOILERS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

AND

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN

No. 1178

"ITALIA"-SOCIETA ANONIMA DI NAVIGAZIONE, AS OWNER OF THE ITALIAN VESSEL "AUSSA," HER ENGINES, BOILERS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

AND

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN

No. 1179

"ITALIA"-SOCIETA ANONIMA DI NAVIGAZIONE, AS OWNER OF THE ITALIAN VESSEL "ARSA," HER ENGINES, BOILERS, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

AND

JAMES E. MARKHAM, ALIEN PROPERTY CUSTODIAN

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES AND THE ALIEN PROPERTY CUSTODIAN IN OPPOSITION

The opinion of the United States Circuit Court of Appeals for the Third Circuit (R. 135–143) is reported at 153 F. (2d) 138. The opinions of the United States District Court for the District of New Jersey in the cases of the *Aussa* (R. 76a–82a) and the *Brennero* (R. 87a–91a) are reported at 52 F. Supp. 927 and 53 F. Supp. 441, respectively, but in the cases of the *Arsa* (R. 83a–84a) and the *Alberta* (R. 85a–86a) are not reported.

The four judgments of the Circuit Court of Appeals were entered on December 21, 1945 (R. 149–152). A petition for rehearing (R. 157–185) was denied by four orders entered on February 13, 1946 (R. 188–192). The petition for writs of certiorari were filed on April 30, 1946. The jurisdiction of the Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

These proceedings are substantially identical with Nos. 1172–1175, now pending on petition for writs of certiorari. The respondents herein filed a brief in opposition to the petition in those cases to which the attention of the Court is respectfully invited. For the reasons therein stated, we submit that the petition in the instant cases should likewise be denied.

J. HOWARD MCGRATH,
Solicitor General.

RAOUL BERGER,
General Counsel to the
Alien Property Custodian,
Of Counsel

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